No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,

vs.

E. B. WELCH,
Appellee and Cross-Appellant.

Appeal and Cross-Appeal from an Admiralty Decree of the United States District Court for the Northern District of California

Honorable Bruce R. Thompson, District Judge

BRIEF FOR APPELLEE AND CROSS-APPELLANT

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JURISDICTION

This Court has jurisdiction in this case on the basis of the facts and authorities cited in Appellant's Opening Brief.

INTRODUCTION

Appellee, E. B. Welch, a marine engineer, suffered permanent back injuries aboard appellant's ship in the course of dismantling and carrying heavy parts

of a disabled standby lube oil pump to the ship's machine shop for necessary repairs. Appellee was acting under direct orders of his superior officer while performing this work. The assigned task was rated as a two-man job. The extra man required for such work was normally provided *without request* and a helper was in fact initially furnished to work with appellee on this job. The helper's normal work day ended at noon and he left the job before it was finished. No substitute was furnished appellee to complete the task. Appellee however, in obedience to his orders, continued to do the required work alone. He sustained injury while carrying the several heavy parts of the pump (metal pistons weighing 100 lbs. each and a metal crosshead which weighed over 40 lbs.) by reason of the shipowner's failure to provide the additional man on the required job.[1]

The District Court found the shipowner liable and assessed damages for appellee's injuries in the total sum of $38,450.00 (Finding No. 19, R. I, 46; Conclusion No. 3, R. I, 47); the Court also found that appellee's own negligence contributed 50% to the accident (Finding No. 20, R. I, 47; Conclusion No. 4, R. I, 47). A final decree in Mr. Welch's favor was entered

[1]The record in this case consists of 3 volumes and various exhibits. References to the numbered volumes are by volume and page, e.g. (R. I, 17). Two depositions, those of Pak and Goodheim, were introduced into evidence at the trial without reading them in open court and are referred to by deponent and page, e.g. (Pak 33). All other exhibits are referred to by their original designations, e.g. (Resp. Exh. B).

for $19,225.00 upon findings of unseaworthiness of appellant's vessel based on the shipowner's failure to provide sufficient men for the assigned task. The nature and extent of Mr. Welch's injuries and the amount of the award is not challenged by the appellant.

The shipowner seeks reversal of the decree contending: (1) the Court erred in finding that "carrying the crosshead" (a part of the disabled pump) was rated as a two-man job (Appellant's Opening Brief p. 5); and, (2) the Court erred in holding the vessel unseaworthy for its failure to provide two men to carry such crosshead about the ship.

The injured seaman cross-appeals and seeks reversal of that part of the decree which reduced his damages on the basis of contributory fault, urging: (1) there was no evidence to support the finding of contributory negligence; (2) obedience to orders of his superior officers aboard ship cannot constitute contributory negligence; and, (3) the Court erred in reducing damages by 50% based upon an erroneous finding of contributory negligence.

The following factual summary and appellee's argument will demonstrate that the findings of unseaworthiness are based upon substantial evidence, entirely consistent with applicable principles of maritime law; and further that the District Court erred in reducing damages by finding contributory negligence on appellee's part. The Court's Findings and Conclusions of Law and the Final Decree are included in the Appendix to this Brief.

STATEMENT OF FACTS RELATING TO THE ISSUES OF UNSEAWORTHINESS AND CONTRIBUTORY NEGLIGENCE

Appellee, E. B. Welch, a married man 64 years of age has been a licensed marine engineer for the past twenty years (R. II, 5). He holds a third assistant engineer's license for diesel ships and a chief engineer's license for steam vessels (R. II, 5). About fifteen of his twenty years at sea were devoted to the service of the appellant steamship company (R. II, 5). Prior to injury, the employer admittedly had high regard for appellee's capabilities as a marine engineering officer (R. III, 5).

The accident occurred on the afternoon of February 19, 1964 while appellee was employed as a third assistant engineer aboard appellant's passenger ship, the SS. PRESIDENT ROOSEVELT (R. II, 5, 12, 51). En route to Los Angeles from San Francisco, it was observed that the standby lube oil pump in the forward engine room of the vessel was pounding (R. II, 13). The function of this pump is to cut in when one of the regular lube oil pumps supplying lubrication oil for the main turbines fails (Goodheim 31). Upon arrival at Los Angeles, the vessel could not safely proceed to sea without first repairing this standby pump (R. II, 14; Goodheim 33). The vessel was regularly scheduled to sail from Los Angeles the next day, February 20, 1964 (Goodheim 32).

On the morning of February 19th, the ship's First Assistant Engineer, Mr. Frank Pak, who was appellee's superior officer, ordered Mr. Welch to dismantle the pump and make the necessary repairs (R. II, 12;

Pak 5). The pump was located in the forward engine room on the starboard side, aft (R. II, 12, 59). The vessel had two engine rooms, one forward and one aft (R. II, 69). On the day involved, the forward engine room was under the supervision of Mr. James Goodheim, the second assistant engineer, who was Mr. Welch's immediate superior and the watch officer there in charge (R. II, 13; Goodheim 25).

During the morning of February 19th, an oiler was assigned to assist appellee with the required work on the standby pump (R. II, 16). The oiler was on the 8-12 watch, which meant that his working hours were from 8:00 a.m. to 12:00 noon, and from 8:00 p.m. to 12:00 midnight (R. II, 16). With the assistance of the oiler, appellee dismantled the pump to the extent of exposing the parts for repair (R. II, 63). Appellee and the oiler then removed the two pistons and the crosshead from the pump housing (R. II, 63). About noon, the oiler left the engine room after having completed his "watch" (R. II, 16, 17). Appellee returned from lunch about 12:30 p.m. (R. II, 5-6), and found himself without assistance (R. II, 17). At this point in the repair procedure, it was necessary to take each of the two pistons and the crosshead to the machine shop of the vessel (R. II, 17). The pistons consist of long steel rods with metal cylinders at one end about fourteen inches in diameter and six inches thick (R. II, 14). It is undisputed that each piston weighs in excess of one hundred pounds (R. II, 14; Goodheim 5). The crosshead, which holds the pistons in a rigid position inside the pump, is a two-piece metal casting

secured together by four studs, 6 to 8 inches square, and weighs 42 pounds (R. II, 14, 15, 61; R. III, 7).

Although both the First Assistant Pak and the Second Assistant Goodheim were aware that carrying the pistons and crosshead to the machine shop was a two-man job, a substitute helper was not assigned to assist Mr. Welch in the afternoon to complete the required task (Pak 9, 10; Goodheim 5, 6). Both Pak and Goodheim had authority to call out additional men but were unable or neglected to do so (Pak 10). Mr. Goodheim was in the forward engine room within fifteen feet of Mr. Welch and observed him in the afternoon working alone on the standby lube oil pump, but he himself could not lend Mr. Welch a hand because he was engaged in necessary repairs on another one of the vessel's pumps (the coffin feed pump) (Goodheim 9, 15). There was of course also a fireman on watch in the forward engine room but he could not be spared to assist Mr. Welch because he had the duty of tending the boilers (Goodheim 15). All additional members of the engine room crew who were on duty at that time were working on the boilers in the after engine room, which had been shut down or secured because of their malfunctioning (Pak 9; Goodheim 8, 15). There was *no* help available to Mr. Welch (Goodheim 8). Nor did Mr. Welch, in his capacity as Third Assistant Engineer, have authority to call any men out himself (Pak 16; R. II, 20). Moreover, the engine storekeeper who had been delegated authority to call out wipers (maintenance men) as helpers, was not in his storeroom, the door of which was padlocked at the time (R. II, 90).

Lacking assistance, Mr. Welch proceeded to carry out his orders to repair the standby lube oil pump alone (R. II, 96). Appellee picked up the first piston from the floor plates near the lube oil pump, and carried it up a ladder of approximately ten rungs by taking it up one step at a time; he then lifted it over a six to eight inch coaming, proceeded through a watertight door, and carried the piston for several more feet to the machinery space (R. II, 97). Mr. Welch then checked the nuts for tightness and the condition of the piston rings. Appellee, finding nothing wrong with this piston, carried it back down to the floor plates by the same route. Mr. Welch then repeated the same procedure with the second piston (R. II, 98, 99). He made a total of four trips up and down the ladders and over the coamings with these heavy parts of the pump. At the conclusion of lifting and carrying the pistons to and from the machinery space, appellee's back felt "tight" (R. II, 99).

After setting down the second piston, appellee picked up the metal crosshead (R. II, 99). Although the crosshead is composed of two separate halves, the studs or bolts which held it together were "battered", and appellee could not unscrew the corresponding nuts without the aid of a vise (R. II, 16, 93; Goodheim 7). There was no vise in the forward engine room (Goodheim 7). It therefore was necessary for appellee to carry the entire crosshead to the machine shop where an appropriate vise was located. The ship's machine shop was further distant than the machinery repair space where he had examined the pistons. Thus, in

addition to climbing the ten rungs of the engine room ladder, and clearing the coaming of the watertight door, with the crosshead, it was necessary to carry this unwieldy metal part about twenty-five feet more through the repair space between the forward and after engine rooms, thence up over another six to eight inch coaming through a second watertight door and then over another ten foot space into the machine shop (R. II, 17-18).

When appellee reached the first watertight door, carrying the crosshead, he heard and felt a "pop" in his lower back (R. II, 21, 22). He set the crosshead down on a bench, straightened himself out, and continued to the machine shop with the crosshead (R. II, 22). At the machine shop, Mr. Welch placed the crosshead in a vise, removed the studs or bolts, so that the machinist could reface it (R. II, 22).

Appellee thereupon left the machine shop and went directly to the forward engine room where he reported his injury to his immediate superior, the Second Assistant Engineer (R. II, 23). Mr. Goodheim told him to "knock off" and he went to his quarters (R. II, 23, 24). Mr. Welch also reported the accident to Mr. Pak, the First Assistant Engineer, who told him to take the rest of the day off (R. II, 24). Appellee was confined to his quarters with pain and numbness in his right hip and leg until the vessel reached Honolulu, about five days after his injuries (R. II, 25, 31). During this time, he received some medical attention from the ship's surgeon, Dr. McLennan (R. II, 31). When the vessel berthed at

Honolulu, Mr. Welch was in great pain; he was given a hospital slip, and reported to the United States Public Health Service Hospital (R. II, 32).

After examination at the Honolulu facility of the Public Health Service Hospital, Mr. Welch was declared "not fit for duty" (R. II, 32). Although in severe pain, he was required to return to his ship and wait there until an airplane ticket was obtained for him (R. II, 36). Appellee then had to walk back to the inshore side of the dock, and was taken by cab to the airport (R. II, 37). A porter placed him in a wheelchair and Mr. Welch was wheeled to the plane (R. II, 37). There were no representatives when he arrived (R. II, 37). It wasn't until the following day that appellee was admitted to the United States Public Health Service Hospital at San Francisco (R. II, 38). Mr. Welch was kept in a traction device for about fifteen days (R. II, 39). After his discharge as a bed patient he continued treatment at the same hospital facility on an out-patient basis (R. II, 41). Appellee was made permanently not fit for duty on October 5, 1964 (R. II, 41), and is unable to return to sea (R. II, 44). The pain in appellee's right leg and hip is of a permanent nature; he is unable to lift, bend or walk more than a short distance without sitting down and resting (R. II, 44).

As a result of the accident and Mr. Welch's resultant injuries, the District Court found the shipowner liable and assessed damages of $38,450.00 which were reduced by 50% on the basis of a finding of contributory negligence on appellee's part. A final decree

was therefore made and entered in favor of Mr. Welch in the sum of $19,225.00 (Findings Nos. 19-21, R. I, 46-47). The shipowner does not challenge the nature and extent of Welch's resulting disability or the amount of the award. Appellee on his cross-appeal, contends that the finding of contributory negligence was error and the total award of damages should not have been reduced in the decree (Findings Nos. 20, 21, R. I, 47).

SPECIFICATION OF ERRORS ON CROSS-APPEAL

Cross-appellant specifies the following errors upon which he relies for reversal of that portion of the decree relating to the issue of contributory negligence:

1. The District Court's Finding No. 20 (R. I, 47) is clearly erroneous in stating that libelant was guilty of contributory negligence for his failure to request additional help to aid him in his assigned task, since there was no evidence that additional help was available at the time. Knowledge on the part of the shipowner of the unsafe working condition is irrelevant to liability on the ground of unseaworthiness of the vessel for dereliction of the shipowner's non-delegable and continuing duty to provide at hand two men for a two-man job.

2. Obedience to orders of superior officers aboard ship cannot constitute contributory negligence where there was no safe alternative provided by the shipowner at hand.

3. The District Court erred in finding and holding (Findings Nos. 20, 21, R. I, 47; Conclusions No. 4, 5, R. I, 47-48) that the injured seaman's damages should be reduced by 50% based upon an erroneous finding of contributory negligence, since there was no evidence that appellee was negligent and/or that any want of ordinary care on the seaman's part directly contributed to the accident for which damages are sought.

SUMMARY OF ARGUMENT

On the Appeal.

1. Substantial evidence supports the District Court's Findings that the failure of appellant to provide appellee with sufficient help for the required task rendered the vessel unseaworthy.

2. Where appropriate findings of essential facts are made which decide or dispose of the issues presented, the trial court is not required to make additional findings on peripheral matters.

3. The rule with regard to proof of causation in seamen's cases differs from that applied at common law. It is sufficient to show that the shipowner's dereliction of duty (unseaworthiness) contributed in whole or in part to the injury for which damages are sought. The unseaworthy condition *need not be a proximate cause* of the accident for liability to attach.

4. The shipowner's failure to provide sufficient men at hand for an assigned task *on a fully manned ship* renders the vessel unseaworthy.

On the Cross-Appeal.

1. The shipowner has an *absolute, continuing and non-delegable* duty to provide sufficient men at hand for the required task. This duty of the employer cannot be shifted to the employee under the guise of contributory negligence.

2. There is no evidence in the record to support the finding that appellee was guilty of contributory negligence because of his failure to request assistance. Proof that additional help was available at hand to aid appellee in the required task is an indispensable predicate for such finding of contributory negligence. Appellant failed in its burden of proof on this issue.

3. Total lack of evidence on the availability of help at hand for the assigned task, requires reversal of the District Court's holding of contributory negligence, since appellant has failed to prove the causal connection between appellee's conduct and the resultant injuries. Before damages may be reduced, negligence of the injured seaman, if any, must be shown to have *directly contributed* to the accidental occurrence.

4. Appellee suffered his injuries for lack of help in the course of his assigned task while acting under direct orders of his superior officers. Faithful performance of orders aboard ship cannot be made a basis for contributory negligence, particularly where appellant had the *continuing, non-delegable* duty to provide the assistance *at hand.*

ARGUMENT ON THE APPEAL

I. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT THE FAILURE OF APPELLANT TO PROVIDE APPELLEE WITH SUFFICIENT HELP FOR THE REQUIRED TASK RENDERED THE VESSEL UNSEAWORTHY.

A. Trial Court's Finding on the Factual Issue of Unseaworthiness Are Conclusive Unless "Clearly Erroneous".

The rules relating to appellate review in an admiralty case are well defined and need no extensive elaboration. Appellant, in its brief, however, has chosen to select portions of the record out of context in an attempt to support its position. For this reason, a brief summary of the established rules are in order.

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. [citing authorities]. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' [citing authorities]."
>
> (*McAllister v. United States* (1954) 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20.)

See also:

> *Guzman v. Pichirilo* (1962) 369 U.S. 698, 702, 82 S. Ct. 1095, 8 L. Ed. 2d 205.

Appellant also challenges the District Court's findings with the assertion that the Court failed to men-

tion several factors that appellant deems important (Appellant's Opening Brief, p. 6). Prior to examining this challenge for merit, it appears of record that appellant made no request in the Court below for additional findings on any or all, save one, of those "factors" which appellant now claims are important omissions of the trial Judge (Respondent's Objections to Proposed Findings, R. I, 56). Moreover, examination of these "factors" reveal them to be of the most peripheral nature. Where appropriate findings of essential facts are made by the trial Court which decide or dispose of the issues presented, additional findings are not required.

See:

In re Imperial Irrigation District, 38 F. Supp. 770, 772 (S.D., Calif. 1941), *aff'd* (9th Cir., 1943) 136 F. 2d 539, *cert. den.* 321 U.S. 787, 64 S. Ct. 784, 88 L. Ed. 1078 (1944), holding:

> ". . . The court need not find on every issue requested, but a finding of such essential facts as lay a basis for the decision is sufficient [citing cases]. . . . Clearly the rule does not require the court to make elaborate findings upon facts which are inappropriate to the decree entered, nor upon all such facts as will fully present every possible view of the case."

In this context, appellant asserts at page 7 of its brief that "If the plaintiff proves that a vessel is unseaworthy, he must also prove that the unseaworthiness *proximately* caused the injury" (Emphasis added).

Such assertion is not the maritime law.

The causal connection between unseaworthiness and injury need not be "proximate" or "a proximate cause" for liability to attach. With regard to proof of causation in seamen's cases, the rule differs from that applied at common law. In seamen's cases (and in Federal Employee's Liability Act cases) the Supreme Court holds that "the test is simply whether the proofs justify with reason the conclusion that negligence of the employer, or any unseaworthy condition of the ship *played any part, even the slightest,* in producing the injury for which damages are sought".

See:

Ferguson v. Moore-McCormack Lines, Inc. (1957) 352 U.S. 521, 523, 77 S. Ct. 457, 1 L. Ed. 2d 511;

Sentilles v. Inter-Caribbean Shipping Corp. (1959) 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142;

Rogers v. Missouri Pacific Railroad Co. (1957) 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493.

B. The Finding That Appellant's Failure to Provide Appellee With Sufficient Help for the Required Task Is Amply Supported by the Record.

The main thrust of appellant's argument is that there is no evidence in the record that carrying a 42-pound crosshead was rated aboard the vessel as a two-man job (Appellant's Opening Brief, p. 8). Initially, appellant fails to correctly state the substance of the

Court's findings on this issue. The precise findings of the trial judge on this subject were as follows:

> "6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help libelant with dismantling the pump on the morning of the date of the accident, but the oilers time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone." (Finding No. 6, R. I, 43).

It is manifest from the foregoing language that the court found that the *entire task* (dismantling the pump and carrying the pistons and the crosshead to the repair space) was rated as a two-man job. The court did not limit its findings to the carrying of any one particular part, but also found that ". . . each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons on the pump) are of considerable weight" (Finding No. 5, R. I, 42-43). Consequently, appellant's failure to assign an additional man to assist appellee in dismantling the pump *and* transporting its parts to the machine space for repair rendered the vessel unseaworthy (Finding No. 8, R. I, 44).

The reasons why the required work was rated as a two-man job seem obvious in the light of the foreseeable circumstances. Even without resort to permissible inference, the court could conclude that not

only was the strength and agility of more than one man required to lift and aid or spell each other in carrying the heavy parts about the ship, but time-wise, profit-wise and with due regard for the safety of its employees, two men were necessary to safely accomplish the assigned task.

The record discloses that appellee felt a "pop" in his back while carrying the crosshead. He also testified that immediately prior to handling the crosshead, he made four trips up and down the steep engine room ladder over the coaming of the watertight door to the machine space and felt a tightness in his back (R. II, 97-99). Significantly, no evidence was offered by appellant to contradict the fact that *each* piston weighed in excess of 100 pounds (R. II, 14). Appellee's testimony in this regard was as follows:

> "Q. After you put it back down—how did your back feel at that time, having lifted and carried each of these pistons up and down?
> A. I would say it felt tight. It was a pretty heavy lift.
> Q. Now, the next thing that you did after you had set it down, that is the second piston, was when you picked up the crosshead?
> A. Right." (R. II, 99.)

Although it is axiomatic that the District Court is the proper judge of the credibility of witnesses, it should be noted, despite appellant's implication to the contrary (Appellant's Opening Brief, pp. 8-9, n. 2), appellee's testimony concerning the tightness in his back occasioned by carrying the pistons was presented

prior to the evidence by appellant that the crosshead weighed 42 lbs.

The court's finding that the carrying of the pistons and the crosshead was rated aboard the vessel as a two-man job has ample support in the record. Appellee's superior officer, Mr. Pak, a Marine Engineering Officer with twenty years of experience, and the First Assistant Engineer aboard the ship testified as follows:

> "Q. How many men are required in normal, customary, usual practice to lift out each one of those pistons from the pump?
> A. Well, normally we have two or three men on a job like that.
> Q. And carrying each one of those pistons, or the crosshead, up to the machine shop, how many men are usually required to do that manually?
> A. Two or three men" (Pak 9).

Upon direct examination after proper foundation had been laid, appellee gave the following testimony:

> "Q. Now, then, getting back to this particular pump. I take it, Mr. Welch, that lifting the piston out of the pump is a two-man job?
> A. Right.
> Q. Carrying each piston from the pump to the machine shop is a two-man job?
> A. Yes.
> Q. Lifting the crosshead out of the pump is a two-man job?
> A. Yes.
> Q. Carrying the crosshead from the pump to the machine shop is a two-man job?
> A. Right" (R. II, 20).

At no time during the trial, did appellant offer a scintilla of evidence in conflict with either the testimony of Mr. Pak or appellee that carrying such parts from the disabled pump to the machine space is rated as a two-man job (Transcript of District Court's Concluding Remarks 3).

The trial court was not required to make its findings in a vacuum without regard to the realities revealed by the evidence. Findings of fact are properly made in the light of all the circumstances disclosed by the proofs and often the surrounding circumstances are of equal importance with the isolated event.

Appellant's insistence that the trial court must isolate the proverbial straw which breaks the camel's back in a situation where a seaman is injured through the dereliction of the shipowner's duty in failing to provide sufficient men for an assigned task, is indeed a strained construction of reality.

Appellee cannot improve upon the comments of the District Judge in disposing of appellant's contention in this regard, which were as follows:

> "I think it is also very clear from the evidence that Mr. Welch did suffer an injury while dismantling the pump and carrying the parts about in the course of this repair.
>
> "I don't know that it is important to determine just what point, or on what step of the ladder, for example, the critical injury occurred, but the Court finds that the preponderance of the evidence shows that it occurred while he was carry-

> ing the crosshead, Exhibit C, which although not as heavy as the witnesses for the libelant would want everyone to believe, it was nevertheless a substantially heavy item to carry up what amounts to a ladder, that is, a steep staircase. How heavy something is depends a lot upon the circumstances under which it is being handled, and the Court believes that this was a substantially heavy item to be handled by one man under those circumstances" (Transcript of District Court's Concluding Remarks 4).

The District Court correctly noted that all the circumstances are to be considered in determining whether unseaworthiness exists in a given case.

See: *Rodriguez v. Coastal Ship Corp.,* 210 F. Supp. 38, 43 (S.D. N.Y., 1962) holding:

> "What an industry does or fails to do, while it may have some evidential value, does not establish or diminish the measure of legal duty—an absolute one to supply a seaworthy vessel. Whether or not the shipowner has measured up to that duty is determined by the trier of the fact upon *all* the evidence in a given case and not by the standard set by industry practice." (Emphasis added)[2]

This same principle was discussed and followed by the Fourth Circuit in *Bryant v. Partenreederei-Ernest Russ* (1964) 330 F. 2d 185. In that case, the shipowner argued that the tactics which occasioned

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[2]The *Rodriguez* case, supra, was recently cited with approval by the Court of Appeals for the Ninth Circuit in *Hudson Waterways Corporation v. Schneider,* 365 F. 2d 1012 at page 1015.

the accident were encompassed in the usual work regularly done by ship ceilers and which they were hired for and expected to do. Although the court recognized that the workman was hurt while engaged in a customary activity, it rejected the shipowner's argument with the following observation at page 189:

> ". . . We feel, however, that it would be unjust to say that when these tactics lead to injury . . . the shipowner may escape liability by pleading that the worker was doing that which he was required to do. Where a shipowner fails to abide by his duty to furnish his workers with safe appliances and a safe place in which to work, he must face the resulting consequences. He may call the tune, but he also must pay the piper. *Seas Shipping Co. v. Sieracki,* supra; *Mahnich v. Southern S.S. Co.,* 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).
>
> "Additionally, we think that the trial court attempted to limit the standard of reasonable fitness by erroneously interpreting it to mean fitness as determined by prevailing customs of the trade . . . . It is an established principle, however, that in negligence actions under the Jones Act, prevailing trade customs cannot furnish the legal standard of due care. [Citing cases.] This being true, we fail to perceive any logical reason why trade customs should be permitted to form the legal standard of seaworthiness in actions under the general maritime law."

The record here amply supports the trial court's findings that the job of dismantling the standby pump, and carrying its separate parts to the machine

shop was rated aboard the vessel as a two-man job and in fact, required the strength and agility of two men to safely complete such task. Appellee's proofs were also more than sufficient to satisfy the applicable legal standard of causation in that reason justifies the trial court's finding that the shipowner's dereliction of duty (the unseaworthiness of the ship) played a significant part in producing the injury for which damages were awarded.

II. THE DISTRICT COURT APPLIED CORRECT LEGAL STANDARD IN FINDING THE VESSEL UNSEAWORTHY.

The District Court found the vessel unseaworthy by reason of its failure to provide libelant with sufficient men for the task assigned to him (Finding No. 8, R. I, 44). Appellant argues that the Court applied an incorrect legal standard in determining unseaworthiness; it urges that the test should be the sufficiency of the crew as a whole rather than assigning sufficient men required for a particular task (Appellant's Opening Brief p. 10). This is hardly a fresh argument. Indeed the same shipowner who appeals here has previously and unsuccessfully made the identical argument to this Court.

In *American President Lines, Ltd. v. Redfern,* 345 F. 2d 629 (9th Cir., 1965) where the issue was whether freeing a stuck sea valve was a two-man job *on an admittedly fully manned ship,* this Honorable Court's holding then, equally applicable now, was as follows:

"A stuck sea valve, the trial judge found—and the finding is supported by substantial evidence—is suitable only if operated by two men; otherwise, it constitutes a dangerous condition. Nor was such an occurrence so unexpected or isolated as to be 'completely unforeseeable' as in *Morales v. City of Galveston,* 370 U.S. 165, 171, 82 S. Ct. 1226, 8 L. Ed. 2d 412 (1962), and hence not a peril to be guarded against; here, the evidence was all to the effect that on shipboard all valves have a tendency to stick on occasion, due to temperature changes, the manner of their construction and various other factors. In this setting, we are satisfied that the court was justified in determining that the HOOVER was not reasonably fit for service because she was improperly manned—'a classic case of an unseaworthy vessel'. *June T., Inc. v. King,* 290 F. 2d 404, 407 (5th Cir. 1961)." (345 F. 2d, at 631-32).

In *Redfern,* supra, one could not predict whether the sea valve was stuck until at least one attempt to free it had been made. In the instant case, it was clearly foreseeable that both pistons and the crosshead from the disabled pump would have to be carried to the machine space for inspection and repair. Indeed, it is undisputed that two men were in fact assigned for the initial dismantling of the pump (which merely required removing the pistons and crosshead from the pump). It follows that lifting and transporting these heavy parts of the pump up a steep ladder and through water-tight doors required at least the agility and strength of an equal number of men.

Moreover, the "dangerous condition" referred to in the *Redfern* case, supra, was the danger which existed when one man attempted to operate the valve alone. The Court in *Redfern* did not hold, as appellant suggests in its Brief, that the valve (or here the piston and crosshead) was dangerous in itself. "The valve could not be separated from its surroundings and viewed separately without unduly distorting its significance." (345 F. 2d at 631).

Appellant cites the case of *Waldron v. Moore McCormack Lines, Inc.* (2nd Cir., 1965) 356 F. 2d 247; appellee recognizes that certain language in the *Waldron* opinion is in apparent conflict with the decision of this Court in *Redfern,* supra, and also conflicts with other well established principles of maritime law. Appellee respectfully refers this Court to the able dissent of Judge J. Joseph Smith in the *Waldron* case and further notes that the Supreme Court has granted certiorari in *Waldron* (35 U.S. Law Week 3124).

The *Waldron* case, however, does not disapprove of the holding in *Redfern*—even though appellant does suggest otherwise. In *Waldron,* supra, the Court states the following:

> ". . . Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. *Crumady v. Joachim Hendrick Fisser,* 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413. So also with a stuck valve that could only be 'broken' by the use of tools *or several men working together. American President Lines, Ltd. v.*

Redfern, 9 Cir., 1965, 345 F. 2d 629." (Emphasis added) (356 F. 2d, at 250).

Appellant raises one further point with respect to an application of law by the trial judge. Appellant intimates that the trial judge 'erroneously' applied the same rule of law in this case as he 'erroneously' applied in the case of *Victory Carriers, Inc. v. Guiton,* No. 20,405 (9th Cir.). We hesitate to comment on unreported excerpts from a record on appeal in another case nor do we see the relevance of the quoted language from the *Guiton* case which we understood from Appellant's Brief dated November 25, 1966, is presently on appeal.

The records of the Court of Appeals for the Ninth Circuit, however, reveal that the appeal in the *Guiton* case, supra, was dismissed by stipulation of the proctors for the respective parties (including proctors for the appellant here) on September 13 and September 20, 1966.

Under these circumstances, by application of the principles of stare decisis, the case of *Victory Carriers v. Guiton,* No. 28,640 (N.D. Calif.) becomes persuasive authority in favor of appellee.

ARGUMENT ON CROSS-APPEAL

I. THE DISTRICT COURT'S FINDINGS THAT APPELLEE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IS UNSUPPORTED BY THE RECORD AND IS CLEARLY ERRONEOUS.

The District Court found that "libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964." (Finding No. 20, R. I, 7) Examination of all the Findings and the entire record reveals that this is the sole basis for the Court's reduction of libelant's damages by fifty (50%) percent.

There is no evidence and no basis in law for the Court's determination that appellee was guilty of contributory negligence in the situation presented to the trial court. The District Court's finding that appellee was guilty of contributory negligence is also inconsistent with the trial court's other findings on liability which are unchallenged by appellee.

In order to sustain a determination of contributory negligence, the District Court must find that appellee failed to act as a reasonably prudent man would under similar circumstances. As Judge Marshall stated in the *Ktistakis v. United Cross Navigation Corp.* (2nd Cir. 1963) 316 F. 2d 869, 870-71:

> ". . . In considering whether plaintiff has been contributorily negligent, the District Court should have judged plaintiff's conduct by the traditional negligent standard of whether he exercised the care which a reasonably prudent man would have exercised under the similar circumstances. *Dixon v. United States,* 219 F. 2d 10, 16-17 (2nd Cir.

1955). Because the District Court failed to use this standard, the finding that plaintiff was contributorily negligent is reversed."

Any inquiry on this subject, therefore, must initially consider the particulars and surrounding circumstances upon which the District Court found appellee to have acted below the reasonable man standard. And secondly, whether want of ordinary care on appellee's part *directly* contributed to the accident for which damages are sought.

The following facts as found by the District Court are a necessary predicate in considering the points raised on the cross-appeal:

Appellee commenced to dismantle the standby oil lube service pump located in the forward, lower engine room and to make the necessary repairs thereto on the morning of February 19, 1964 "upon orders of his superior officer" (Finding No. 5, R. I, 42-43). The repairs on the malfunctioning pump were required since ". . . the ship could not safely go to sea unless this standby pump was in operating condition" (Finding No. 5, supra). This repair necessitated carrying two pistons and a crosshead, each of "considerable weight" up from the forward engine room to the ship's machine shop (Finding No. 5, supra). The job of dismantling the pump and carrying its parts to the ship's machine shop was rated as a two-man job (Finding No. 6, R. I, 43). An oiler had been assigned on the morning of February 19th, but the oiler's time was up at noon and he went off duty (Finding No. 6, supra). Appellee was not provided with a substitute

helper and had to transport the parts up to the machine shop alone (Finding No. 6, supra). In the course of carrying these parts, appellee was injured (Finding No. 7, R. I, 43-44). The failure of appellant to provide appellee with sufficient men rendered the ship unseaworthy (Finding No. 8, R. I, 44). Thereupon, the District Court found appellee contributorily negligent for failure to request additional help of his superiors (Finding No. 20, R. I, 47; Conclusion 4, R. I, 47).

Appellee contends that in this posture, the evidence cannot support a determination of contributory negligence and such finding is clearly erroneous.

See:

McAllister v. United States (1954) 348 U.S. 698, 702, 82 S. Ct. 6, 99 L. Ed. 20.

What the Court below did was to erroneously accept the shipowner's canard that 'if the injured seaman had requested help, the help would have been furnished'. Upon careful analysis, the shipowner's argument in this regard is without merit. It is merely a backdoor device which attempts to shift the shipowner's absolute, non-delegable and continuing duty (to at all times provide sufficient men for an assigned task) onto the injured seaman under the guise of contributory negligence and make him assume a risk of injury created solely through dereliction of duty on the shipowner's part. Moreover, the canard requires speculation and conjecture; it assumes the availability of additional help, available at hand.

Acceptance of the shipowner's canard also would shift the burden of proof which the shipowner normally has on the affirmative defense of contributory negligence, by assuming such availability of help at hand, without requiring the shipowner to prove such facts by a preponderance of the evidence. The canard also requires speculation, rather than proof from the shipowner, on the causal connection between the injured seaman's failure to make request for help and the direct contribution of such failure to the cause of the accident, where no other safe alternative is shown by the shipowner. Finally, if inquiry is made as to the function of such request which the shipowner would require of the injured seaman, one finds that it is for the purpose of notifying the shipowner of an unsafe working condition. Knowledge on the part of the employer of the lack of the assistance at hand (which is all the request would impart) is immaterial to liability under the doctrine of unseaworthiness. If the shipowner, *with or without knowledge,* refuses, neglects or is unable to supply the required help at hand, the injured seaman still has to obey the orders of his superior and finish the work. He surely should not be held guilty of contributory negligence where he lacks assistance which the employer failed to provide him with for the assigned task.

A. There Is No Evidence in the Record That Additional Help Was Available at Hand. There Is a Failure of Proof by the Shipowner on This Issue.

The finding that appellee was guilty of contributory negligence because he failed to request another as-

sistant when the initial helper left before the job was completed, must have as its evidentiary premise, that a substitute or other help was available at that time. The record, however, contains no such factual support. Indeed, there is substantial evidence to the contrary; that no additional available help was at hand. Furthermore, the shipowner had the burden of proof on this issue.

Mr. Goodheim, who was the engineer on watch in the forward engine room and who was appellee's immediate superior described the situation on the early afternoon of February 19, 1964 in the following words:

> "Q. To your knowledge where were the other engineers and the other members of the unlicensed personnel (that is the black gang) at the time that Mr. Welch was carrying or transporting this particular crosshead up to the machine shop?
>
> A. In the other engine room working on the boilers.
>
> Q. To your knowledge what was the matter or condition of the boilers in the after engine room of the ship?
>
> A. I believe they were leaking.
>
> Q. Was that the situation in the early afternoon of February 19, 1964?
>
> A. Yes sir.
>
> Q. Was there any extra help available to Mr. Welch at the time that he, as you saw, carried this crosshead from the lower flat up to the machine shop?
>
> A. No sir.

Q. Where was the First Assistant Engineer, to your knowledge?

A. Back with the boilers, with the rest of the crew." (Goodheim, 7-8).

Moreover, the engine storekeeper who had authority to call out wipers (maintenance men) as helpers was not in his office, the door to which was padlocked at the time (R. II, 69). Mr. Pak, the First Assistant, who had primary authority to assign unlicensed personnel, was busy in the after engine room (Pak 10). Although Mr. Pak indicates it was his practice to assign men if requested, he fails to indicate whether a man was in fact available on that occasion (See Pak 10, 25-26). And appellee, himself, testified that he did not ask for help because "there was no one around." (R. II, 68).

The District Court is not permitted to base its finding of contributory negligence on conjecture concerning availability of crew members for assignment to aid Mr. Welch in the required task. This is especially true where all the evidence and all reasonable inferences from the evidence point to the opposite conclusion.

B. The Failure of the Injured Seaman to Request Additional Help Is Not Contributory Negligence.

Assuming for the sake of argument only, that additional help was available at the time, and further, that appellee failed to request such help, such failure in itself cannot support a finding of contributory negligence. A determination that the injured seaman is guilty of contributory negligence on that basis confuses contributory negligence with the doctrine of assumption of risk which has been rejected in maritime cases.

See:

Socony-Vacuum Oil Co. v. Smith (1939) 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265;

Palermo v. Luckenbach S.S. Co. (1957) 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3;

Bryant v. Partenreederei-Ernest Russ (4th Cir. 1964) 330 F. 2d 185, 189.

The applicable principle of law is set forth in *Ballwanz v. Isthmian Lines, Inc.* (4th Cir. 1963) 319 F. 2d 457 where it was contended that the plaintiff failed to complain or request other equipment. The court held:

> "We also think it error for the Court to have charged the jury in this case that in considering the seaworthiness of the vessel they might take into consideration the plaintiff's failure to complain or to demand additional material to make the equipment better suited for the purpose for which it was being used.
>
> * * *

"The Courts have held that where a seaman has a choice between a seaworthy or an unseaworthy part of the ship his use of the latter will not relieve the owner of his responsibility. [citing cases] Certainly if a seaman may deliberately choose an unseaworthy part of a ship without loosing his right of recovery then he is under no obligation to complain about his orders or to insist on better equipment." (319 F. 2d 457, at 461-62.)

It was the duty of appellant to provide the assistance. Any attempt to shift this duty to appellee under the guise of contributory negligence or otherwise, is contrary to maritime law.

See:

Cox v. Esso Shipping Co. (5th Cir., 1957) 247 F. 2d 629, 636:

("... The failure of the shipowner to comply with its heavy obligation to select and furnish seaworthy appliances cannot be thus turned into a fault by the seaman.");

Smith v. The United States (4th Cir. 1964) 336 F. 2d 165;

Michalic v. Cleveland Tankers, Inc. (1960) 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.

See also:

Hudson Waterways Corporation v. Schneider (9th Cir. 1966) 365 F. 2d 1012;

(A recent and excellent analysis by the Court of Appeals for the Ninth Circuit on the consequences to a merchant seaman where he fails to promptly obey the orders of his su-

periors aboard ship; and striking down an attempt by a shipowner to shift its duty to the injured seaman under the guise of contributory negligence.)

Indeed, even where a safe alternative is available, the courts have held that use of the defective apparatus does not constitute contributory negligence—or more precisely, one does not assume the risk of the unseaworthy condition.

See:

Hilderbrand v. United States, 134 F. Supp. 514, 517 (S.D.N.Y. 1954), aff'd 226 F. 2d 215 (2nd Cir. 1955);

San Pedro Compania Armadoras, S.A. v. Yannacopoulos, 357 F. 2d 737 (5th Cir. 1966).

Not only is it the ship's absolute, non-delegable and continuing duty (and not that of the seaman) to provide sufficient help for the required task, but the required help, particularly where the hazard is foreseeable, must continuously be provided *at hand.*

See:

Ferguson v. Moore-McCormack Lines, Inc. (1957) 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511;

Street v. Isthmian Lines, Inc. (2nd Cir. 1963) 313 F. 2d 35.

Furthermore, a failure to request assistance in itself does not satisfy the legal test of contributory negligence in maritime cases. The "negligence" of the

injured seaman must "contribute" to the accident. The standard of proof required is ably set forth in *Sizemore v. United States Lines Co.*, 213 F. Supp. 76 (E.D. Pa. 1962), *aff'd*, 323 F. 2d 774 (3rd Cir. 1963). After a review of the applicable case law, the court states the test as follows:

> ". . . A review of the common law indicates that plaintiff's act or omission must at least *contribute directly* to his harm in order to constitute contributory negligence." (213 F. Supp. at p. 83.)

In the *Sizemore* case, supra, the court further held that there can be no mitigation of damages where it is only shown that the act of the plaintiff merely "contributes in any part to the injuries"—the cause or relation must be instead "direct". The test means more than an omission to request assistance, especially where there is no evidence that such assistance could have been provided at the time and where the duty of the shipowner to supply assistance was continuing, non-delegable and absolute.

See:

American President Lines, Ltd. v. Redfern (9th Cir. 1965) 345 F. 2d 629;

Ballwanz v. Isthmian Lines, Inc. (4th Cir. 1963) 319 F. 2d 457.

C. Injury Resulting From Obedience to Orders Cannot Be Contributory Negligence.

The record demonstrates and the findings confirm that appellee was acting under direct orders of his superior officer, the ship's First Assistant Engineer,

in connection with the required task. He was told to dismantle and repair the disabled standby pump (Finding No. 5, R. I, 42-43; R. II, 12; Pak 5). The record also reveals that this job had to be completed with dispatch since the vessel could not safely sail unless this pump was in working order (Finding No. 5, supra; R. II, 14). It is not therefore an exaggeration to characterize the required task as urgent or in the nature of an emergency repair which was necessary for the well being and safe passage of the ship.

Under these circumstances, the only reasonable inference to be drawn from the evidence is that appellee sought to follow his orders and complete the job of repairing the pump as quickly and as best he could with the wherewithal and assistance provided him at hand. The damages caused appellee by his faithful performance of the orders of his superiors should not be reduced under these circumstances.

See:

Hudson Waterways Corporation v. Schneider (9th Cir. 1966) 365 F. 2d 1012.

In *Darlington v. National Bulk Carriers* (2nd Cir. 1946) 157 F. 2d 817, the Court of Appeals approved the following instruction, which had been rejected by the District Court, and which accurately states the applicable law:

> " 'the plaintiff was bound to obey the orders of his superiors on board the vessel. The Chief Officer was the plaintiff's superior and plaintiff was bound to obey the orders of the Chief Officer. Even though the orders of the Chief Officer re-

quired him to work with unsafe tools or under unsafe conditions, the plaintiff was obliged to obey the orders and did not assume any risk of obedience to orders.'" (157 F. 2d at 819.)

In *Darlington,* supra, Judge Frank made the following observation: "the cases make it clear that the safety of ships at sea might be seriously endangered were the rule in accordance with the judge's charge and not as stated in the requested charge" (157 F. 2d at 819).

See also:

Aivaliotis v. SS. Atlantic Glory (E.D. Va. 1963) 214 F. Supp. 568.

It is respectfully urged that appellee cannot be charged with contributory negligence for the faithful performance of the orders of his superior officer aboard ship. Such conduct on his part was at most an assumption of risk, which has no place in maritime law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Decree of the District Court be affirmed except with regard to the finding of contributory negligence on cross-appellant's part and in that regard, the Decree should be set aside with directions to the court below to enter a new decree in the total amount of appellee's and cross-appellant's damages in the sum of Thirty-eight Thousand Four Hundred

Fifty ($38,450.00) Dollars, with legal interest from November 24, 1965 and costs to the appellee and cross-appellant.

Dated, San Francisco, California,
January 20, 1967.

JARVIS, MILLER & STENDER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
By MARTIN J. JARVIS,
Attorneys and Proctors for Appellee and Cross-Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARTIN J. JARVIS,
Attorney and Proctor for Appellee and Cross-Appellant.

(Appendix Follows)

Appendix

Appendix

A

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a seaman's action in admiralty for damages for personal injuries. The issues of maintenance and cure are not embraced within the pleadings. Therefore, they are not included herein. On the pleadings and the evidence, the Court hereby makes the following findings of fact:

FINDINGS OF FACTS

1. Libelant is E. B. Welch, a merchant seaman, now sixty-three years of age and a resident of the City and County of San Francisco, State of California. He has been a licensed Marine Engineer for over twenty years and has a high school education. Mr. Welch holds a Third Assistant Engineer's license for diesel vessels and a Chief Engineer's license for steam vessels.

2. Respondent is American President Lines, Ltd., a corporation, which has a principal place of business in the City and County of San Francisco, State of California.

3. Respondent owned, operated, managed, navigated, maintained and controlled the United States vessel, the SS. PRESIDENT ROOSEVELT, at all times mentioned herein.

4. From April, 1962 to the latter part of February, 1964, Libelant was employed by Respondent aboard

the SS. President Roosevelt as a Third Assistant Engineer. He served aboard said vessel on a series of voyages from San Francisco to the Far East and return to San Francisco. Libelant's immediate superior officers in the Engine Department of said vessel, at the time of his injuries in this case, were the Chief Engineer, Mr. Smith, the First Assistant Engineer, Mr. Pak, and the Second Assistant Engineer, Mr. Goodheim.

5. The accident to Libelant occurred in the early afternoon of February 19, 1964 on board the Respondent's vessel which was then in navigable waters at the Port of Los Angeles, California. On the previous day, during the trip from San Francisco to Los Angeles, the ship's standby steam oil lube service pump located in the forward, lower Engine Room, was found to be pounding and not functioning properly, and on the morning of February 19, 1964, the Libelant, on orders of his superior officer, the First Assistant Engineer, commenced to dismantle this pump and make the necessary repairs since the ship could not safely go to sea unless this standby pump was in operating condition. These repairs necessitated the removal of the pistons and crosshead from the pump and required that these parts be carried up from the pump's location in the forward Engine Room to the ship's Machine Shop. In carrying each of these parts from the pump to the Machine Shop, it is necessary to go up one fairly steep ladder, about ten or twelve steps in the forward Engine Room, then over a coaming of six to eight inches through a watertight door, and across

an auxiliary machine space about twenty-five feet; from there it is necessary to go up another short ladder about four steps and then over a six or eight inch coaming of another watertight door and proceed about ten more feet to reach the Machine Shop space. Each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons in the pump) are of considerable weight.

6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help Libelant with dismantling the pump on the morning of the date of the accident, but the oiler's time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone.

7. In the early afternoon of said date, Libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump. Libelant also lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who relieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting

and carrying the crosshead from the pump to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19, 1964.

8. The failure of Respondent, on the afternoon of February 19, 1964, to provide Libelant with sufficient men, specifically an additional man along with Libelant, to perform the required task of dismantling the ship's standby steam oil lube service pump and transporting its parts from the pump to the ship's Machine Shop for repair rendered Respondent's vessel, the SS. President Roosevelt, unseaworthy in that regard.

9. Libelant sustained severe, painful and permanent injuries and damages as a direct and proximate result of the aforesaid unseaworthiness of said vessel.

10. Libelant's injuries sustained in the accident aboard Respondent's ship on February 19, 1964 consisted of a lateral compression fracture of the body of his third lumbar vertebra with nerve root compression and irritation at that level of his spine, causing him much pain and resulting in weakness and atrophy of the musculature of his right leg. In addition, Libelant had a prior non-disabling and asymptomatic arthritic condition of his lumbar spine which was painfully aggravated and made symptomatic as a result of the injuries he sustained at work on February 19, 1964 aboard Respondent's ship.

11. Libelant received initial medical care and treatment for his injuries from the ship's doctor, and he was placed under medication for severe pain until

the vessel reached Honolulu on February 25, 1964. Libelant was there referred to the Public Health Service where he was examined and found to have an acute spinal injury and was repatriated by air to the United States Public Health Service Hospital facility at San Francisco for further care. The fractured vertebra was confirmed by X-ray and examination disclosed a nerve root compression in the lumbar spine, evidenced by painful limitation of back motion and weakness, atrophy, loss of sensation and impairment of the knee reflex in the right leg. Libelant was treated with pelvic traction, bed rest and medication at the San Francisco facility of the Public Health Service Hospital for about eighteen days. Thereafter he was continued as an out-patient at said hospital facility on a regimen of rest and limited activity with prescribed exercises and further medication for pain. Disability involving the back and the right leg persisted and Libelant was made permanently unfit for sea duty by the doctors at the United States Public Health Service Hospital on October 5, 1964. Libelant was treated thereafter at regular intervals as an out-patient at said hospital and also by a private physician, but there has been no change in his condition. Libelant's disabilities occasioned by the accident of February 19, 1964 consist of painful restriction of his back motion and weakness, atrophy and pain in his right leg. By reason of these disabilities, Libelant cannot engage in work requiring heavy lifting, prolonged standing, squatting or requiring the climbing of ladders or repetitive use of his right leg.

12. Since the accident, in an effort to keep working, Libelant has created a job for himself by the purchase of a jitney bus, and since April, 1965, has been operating said vehicle in San Francisco. He is able to work at his own pace and rest on the job since he is his own boss. He has averaged about $200 net per month at this endeavor.

13. Libelant has a life expectancy of 13.8 years.

14. Libelant was earning and was capable of earning Ten Thousand Five Hundred Dollars ($10,500) per year at the time of his accident aboard the SS. President Roosevelt.

15. Libelant sustained an actual loss of earnings and benefits as a result of said accident (with credit given for payment of unearned wages and credit given for actual earnings as a jitney operator) in the sum of Sixteen Thousand Two Hundred Dollars ($16,200).

16. As a direct and proximate result of said accident, Libelant has sustained damages for past pain and suffering in the sum of Five Thousand Dollars ($5,000).

17. As a direct and proximate result of said accident, Libelant has also sustained a permanent partial impairment of his earning capacity with a loss of future earnings. With respect to future earning capacity and by reason of Libelant's prior medical history including the arthritic condition of his back, it is reasonably probable that he could have worked an additional two and one-half years in his usual employment from and after age sixty-three. Accordingly, the

Court finds that Libelant has suffered damages for loss of future earnings in the sum of Fifteen Thousand Seven Hundred Fifty Dollars ($15,750) based upon a partial loss of earning capacity on total annual earning power of Ten Thousand Five Hundred Dollars ($10,500) per year for Libelant's work expectancy of 2.5 years, discounted to present value at 3.5% per annum.

18. With regard to future pain, suffering and discomfort as a result of said accident, Libelant has suffered damages in the additional sum of One Thousand Five Hundred Dollars ($1,500).

19. Libelant has sustained damages in the total sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident suffered by him aboard the SS. President Roosevelt on February 19, 1964.

20. Libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964. Libelant's own negligence, as aforesaid, contributed fifty per cent (50%) to the accident and the consequences to him.

21. After deducting for Libelant's contributory fault the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), which represents fifty per cent (50%) of Libelant's total damages, the total amount recoverable by Libelant from the Respondent in this case is the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and of the parties.

2. Libelant's injuries and damages were proximately caused by the unseaworthiness of the Respondent's vessel, the SS. President Roosevelt, on the afternoon of February 19, 1964. See *American President Lines, Ltd. v. Redfern* (9 CCA 1965), 345 F. 2d 629; also *June T., Inc. v. King,* 290 F. 2d 404.

3. Libelant sustained total damages, before deduction for his own contributory negligence, in the sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident on board Respondent's ship, the SS. President Roosevelt, on the afternoon of February 19, 1964.

4. Libelant's own negligence contributed fifty per cent (50%) to the accident and consequences to Libelant.

5. Libelant is entitled to a Judgment and Final Decree for damages for personal injuries in his favor and against American President Lines, Ltd., a corporation, in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), plus costs of suit, and with interest at the legal rate of seven per cent (7%) per annum from November 24, 1965.

Dated: November 24, 1965.

Bruce R. Thompson
United States District Judge

B

[Title of Court and Cause]

FINAL DECREE

The above entitled cause came on regularly for trial on November 1, 1965, in the above entitled Court before The Honorable Bruce R. Thompson, United States District Judge, sitting in Admiralty, the parties appearing in person or by their respective proctors; Messrs. Jarvis, Miller & Stender and Martin J. Jarvis, Esquire, appearing as proctors for the Libelant, E. B. Welch, and Messrs. Lillick, Geary, Wheat, Adams & Charles and Frederick W. Wentker, Jr., Esquire, appearing as proctors for Respondent, American President Lines, Ltd. The trial in the action commenced on the 1st day of November, 1965 and concluded on the 2nd day of November, 1965, and oral and documentary evidence having been introduced on behalf of the respective parties, and the Court having fully considered the facts and the law and the arguments of counsel, and having been fully advised, and the cause having been submitted for decision, the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and good cause appearing therefor,

Now, Therefore, by reason of the law and the Findings of Fact aforesaid, It Is Ordered, Adjudged and Decreed:

That the Libelant, E. B. Welch, do have and recover of and from the Respondent, American Presi-

dent Lines, Ltd., a corporation, damages for personal injuries in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), lawful money of the United States of America, with interest thereon at the rate of seven per cent (7%) per annum from November 24, 1965 until paid, together with Libelant's costs incurred in this action amounting to the sum of $175.59, and that Libelant have execution therefor against Respondent unless this decree be satisfied within ten (10) days after entry of this decree and service of a copy of this decree on Respondent or its proctors.

Dated: November 24, 1965.

Bruce R. Thompson
United States District Judge

Original Filed November 26, 1965
Clerk, U. S. Dist. Court